Che Omar bin Mohd Akhir v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO Q-05-87 OF 1997
LAMIN PCA, ABU MANSOR AND HAIDAR JJCA
26 APRIL 1999

Criminal Law *— Murder — Defence of grave and sudden provocation — Whether trial judge had correctly rejected defence — Penal Code s 302*

Evidence *— Witness — Discrepancy in evidence — Effect of — Whether evidence should be totally rejected*

The appellant was charged in the High Court at Kuching for the murder of his second wife ('the deceased'), an offence under s 302 of the Penal Code. At the close of the case for the prosecution, the learned judge was satisfied that the prosecution had proved beyond reasonable doubt that the essential ingredients for an offence under s 302 of the Penal Code had been satisfied. When the defence was called, the appellant elected to give evidence on oath and contended, inter alia, that the injuries were inflicted as a result of grave and sudden provocation at the material time. The learned High Court judge however rejected the appellant's defence of grave and sudden provocation and convicted the appellant on the charge and sentenced him to death. On appeal to the Court of Appeal, counsel for the appellant submitted, inter alia, that there were some contradictions or discrepancies in the evidence of the witnesses for the prosecution.

Held, dismissing the appeal:

(1) It is wrong to say that just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. On the facts, the trial judge had properly evaluated and considered the evidence of the material witnesses and was entitled to come to his own opinion of whether to accept or reject their evidence (see p 693 B); *Khoo Chye Hin v PP* [1961] MLJ 105 followed.

(2) From the appellant's demeanour in court, the trial judge found that the appellant gave an outward impression of being a calm and collected person. Furthermore, from the series of events, the provocation which the appellant was alleged to have suffered was a gradual one. The learned trial judge had therefore adequately considered the evidence relied on by the appellant on the defence of grave and sudden provocation and had correctly rejected the defence (see p 695A–B).

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Tinggi Kuching kerana membunuh isteri keduanya ('si mati tersebut'), suatu kesalahan di

bawah s 302 Kanun Keseksaan. Pada penutup kes pendakwaan, hakim yang arif telah berpuas hati bahawa pihak pendakwaan telah membuktikan sehingga tiada keraguan munasabah bahawa ramuan yang perlu untuk suatu kesalahan di bawah s 302 Kanun Keseksaan telah dipuaskan. Apabila pihak pembelaan dipanggil, perayu telah memilih untuk memberikan keterangan bersumpah dan menegaskan, antara lain, bahawa kecederaan yang dialami adalah diakibatkan oleh bangkitan marah melampau dan mengejut pada masa material tersebut. Namun, Hakim Mahkamah Tinggi yang arif telah menolak pembelaan perayu mengenai bangkitan marah melampau dan mengejut dan telah mensabitkan perayu untuk tuduhan tersebut dan menjatuhkan hukuman mati. Semasa rayuan kepada Mahkamah Rayuan, peguam untuk perayu telah berhujah, antara lain, bahawa terdapat beberapa percanggahan di dalam keterangan saksi-saksi untuk pihak pendakwaan.

Diputuskan, menolak rayuan:

(1) Adalah salah untuk berkata bahawa hanya kerana seorang saksi mungkin memberikan keterangan yang bercanggah atau menipu sekali dua, keterangannya patut ditolak sepenuhnya. Di dalam fakta, hakim perbicaraan telah menilai dengan betul dan mempertimbangkan keterangan saksi-saksi yang material dan berhak untuk membuat pendapatnya sama ada untuk menerima atau menolak keterangan mereka (lihat ms 693B); *Khoo Chye Hin v PP* [1961] MLJ 105 diikut.

(2) Daripada perilaku perayu di mahkamah, hakim perbicaraan telah mendapati bahawa perayu telah memberikan pandangan luaran sebagai seorang yang tenang. Lebih-lebih lagi, melalui siri-siri kejadian, bangkitan marah yang mana dikatakan dialami oleh defendan adalah secara beransur-ansur. Oleh itu, hakim perbicaraan yang arif telah mempertimbangkan dengan cukup keterangan di mana perayu telah bergantung kepada pembelaan bangkitan marah melampau dan mengejut dan dengan itu telah menolak pembelaan tersebut dengan betul (lihat ms 695A–B).]

Cases referred to

Dato Mokhtar bin Hashim v PP [1983] 2 MLJ 232 (refd)
Khoo Chye Him v PP [1961] MLJ 105 (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 182A
Penal Code ss 300 exception 1, 302

Notes

For cases on murder generally, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 887–963.

A For a case on discrepancy in evidence, see 7 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1691.

RJ Noel (*RJ Noel & Co*) for the appellant.

Suhaimi bin Ibrahim (*Marutin Pagan* with him) (Attorney General's Chambers) for the prosecution.

B **Haidar JCA** (delivering judgment of the court): The appellant, Che Omar bin Mohd Akhir, was convicted in the High Court at Kuching for an offence of murder under s 302 of the Penal Code on 21 November 1997 and sentenced to death.

C The charge against him reads:

> That you, on or about 2 March 1996 at about 2150 hours at the Sunday Market, Jalan Satok, Kuching, in the State of Sarawak committed murder by causing the death of one Mary Chelek Ak Rindat @ Nur Afiza bte Abdullah and that you have thereby committed an offence under s 302 of the Penal Code.

D This case was heard by the High Court judge without the aid of assessors in view of the repeal of s 182A of the Criminal Procedure Code (FMS Cap 6) vide the Criminal Procedure Code (Amendment) Act 1995 (A908/95).

The appellant married Mary Chelek ak Rindat @ Nur Afiza bte Abdullah ('the deceased') in June 1993 at a place called Padang Besar in E Thailand. She was his second wife and was a native of Sarawak and hailed from Kuching. The appellant came to know her when she was working as a guest relations officer in a karaoke lounge in Kuala Lumpur. From the marriage, they had a daughter. The appellant was a lance corporal in the Anti-Drug Section of the Royal Malaysian Police Force before his arrest. Both cohabited at the police barracks at Ampang Police Station, Kuala F Lumpur where the appellant was attached. His first wife is Ruziyaton bte Abdul Majid ('DW2'), a nurse, and he had three children by her.

During their marriage, the deceased used to go back to Kuching to visit her mother, Sini ak Kana ('PW9') and the appellant sometimes would accompany her. For reasons which were not clear, the deceased left the G matrimonial home on 13 February 1996 for Kuching without the knowledge or approval of the appellant. She took their daughter with her. The appellant, it seemed, looked for the deceased amongst her friends in Kuala Lumpur but without success. He claimed that thereafter he received two threatening phone calls from an unknown man in Kuching. One call was on 24 February 1996 threatening to kill him if he went over to Sarawak H and the other call was on 28 February 1996 calling him to fetch his child. He then decided to take leave and proceeded to Kuching by air with his brother on 2 March 1996 by taking an early morning flight from Kuala Lumpur.

On arrival in Kuching, he went looking for the deceased at her kampong I but failed to locate her. He then proceeded to Kuching own and bought a knife after he claimed that two men were allegedly following him.

After failing to locate the deceased at the stall of her mother at the Sunday Market, Jalan Satok, he proceeded to the karaoke lounge where he drank stout and beer.

Subsequently, he left for the stall of the deceased's mother where he met the deceased. He talked to the deceased about their relationship and why she left him. This alleged conversation had been quoted in full by the learned judge his judgment (see pp 113–115 of the appeal record). It was after the alleged conversation that the appellant stabbed the deceased three or four times with a knife. The police personnel subsequently came to the scene and arrested the appellant. A knife (exh P2) with blood stain was recovered from the scene by the police.

After presenting the case of the prosecution and the defence, the learned judge proceeded to assess and evaluate the evidence in relation to the vital ingredients to sustain an offence under s 302 of the Penal Code. He was satisfied that:

(i) Mary Chelek ak Rindat @ Nur Afiza bte Abdullah had died on 2 March 1996;

(ii) her death was caused by the act of the appellant; and

(iii) such act was done with the intention of causing death or with the intention of causing such bodily injuries as: (a) the appellant knew to be likely to cause her death; or (b) was or were sufficient in the ordinary course of nature to cause death.

As to (i), there was ample evidence to show that Mary had died on the night of 2 March 1996 at the Satok Sunday Market. This fact has not been disputed by the defence.

The next issue was whether the death of Mary was caused by the appellant. In other words, were injuries sustained by the deceased inflicted by the appellant. Here, we have the evidence of three witnesses who saw the appellant stabbed the deceased with a knife. They were Awang Jamaluddin Udin ('PW7') a friend of the deceased, Sini ak Kana ('PW9'), mother of the deceased, and Nares ak Jenu ('PW10'), a stall owner near PW9's stall. They gave a description of what they saw the appellant did to the deceased on that fateful night.

The learned judge had properly evaluated the evidence of PW7 and PW10 including the claim of the defence that PW7 was the lover of the deceased. This is what the learned judge stated at p 20 (p 121 of the appeal record) of his judgment:

> In my view, the testimonies given by the two eye witnesses, Awang Jamaluddin PW7 and Nares ak Jenu PW10 are clear cut. The evidence of PW7 is consistent throughout notwithstanding a through and lengthy cross-examination by counsel for the accused. The same applies to the evidence of PW10 which remains intact throughout. No one else was involved. There was an attempt to cast aspersions upon the credibility of PW7 by suggesting that he could not be an honest witness because of his romantic links with the deceased Mary at the material time. PW7 had of course denied such accusation and said he was merely a friend of the family. Having heard and observed him giving evidence in court, I am inclined to believe him. His credibility remains intact and unscathed. His evidence that he saw the accused stabbing Mary had been fully corroborated by another totally independent eye-witness Nares ak Jenu PW10. His evidence that he attempted to prevent the accused from further assaulting Mary with a knife was also corroborated by Sini ak Kana PW9.

A knife was recovered at the scene as pointed out to the police by PW7. It was produced and marked as P2. P2 had human blood stains insufficient for grouping (see evidence of the chemist ('PW8') at p 30 of the record). Counsel for the appellant submitted that there were some contradictions or discrepancies in the evidence of the witnesses for prosecution. As we said earlier, the learned judge had considered the evidence of the material witnesses who saw the incident and he was entitled to come to his own opinion of whether to accept or otherwise their evidence. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In this respect, the Federal Court in *Khoo Chye Him v PP* [1961] MLJ 105 at p 107 said:

> ... If a witness demonstrably tells lies on one or two points, then it is clear that he is not a reliable witness, and, as a matter of prudence, the rest of the evidence must be scrutinized with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

The learned judge rightly held that it was the appellant who inflicted those injuries on the deceased with a knife ('P2'). Counsel for the appellant conceded before us that the appellant inflicted those injuries though he qualified that they were involuntarily caused or alternatively under sudden and grave provocation.

As regards ingredient (iii), there were four stab wounds on her chest and 3 stab wounds on her neck as seen by Sgt Rafli ('PW2') when her clothes were removed by the medical staff at the Sarawak General Hospital. The pathologist, Dr Jamil Dolkadir ('PW15') who conducted the post-mortem on Mary's body on 4 March 1996 confirmed those injuries and described them as follows:

(1) a stab wound above the right nipple measuring 3 cm long, 1 cm wide and 9 cm deep, penetrating the right 4th rib, upper lobe of the right lung and right atrium of the heart;

(2) stab wound below the sternum measuring 3 cm long, 1 cm wide (gaping), 7 cm deep, penetrating the diapharagm and the right lobe of the liver;

(3) a stab wound at the upper left of the left breast, measuring 3 cm long, 1 cm wide and 3 cm deep;

(4) a stab wound at the middle of the anterior neck, at the thyroid gland level, measuring 2.5 cm long, 1 cm wide and 1 cm deep;

(5) a stab wound at the lower part of the left scapula laterally measuring 3 cm long, 1 cm wide and 2 cm deep;

(6) stab wound at the back of the spine about level 8 thoraxic vertabrae, measuring 2 cm long, 1 cm wide and 1 cm deep;

(7) stab wound just below 6th wound above, measuring 2 cm long, 1 cm wide and 1 cm deep.

The cause of death was hypovolaemic shock due to massive bilateral haemothorax due to the stab wound at the right chest. From the autopsy

report (exh P20) the right lung had been punctured as a result of the stab wounds.

According to PW 15, injury (1) would in the ordinary course of nature caused death quite apart form injury (2), which was also serious, in that if left unattended, could cause death.

Having satisfied himself that the prosecution had proved beyond reasonable doubt the three essential ingredients for the offence under section 302 of the Penal Code, he ordered for the appellant to enter into his defence on the said charge.

The appellant elected to give evidence on oath. His defence was two-fold, namely:

(1) the injuries on Mary were inflicted accidentally and not intentionally; and

(2) alternatively, they were inflicted as a result of grave and sudden provocation at the material time.

As regards to (1) above, the learned judge found that there was direct evidence of PW7, PW9 and PW10 that it was the appellant who intentionally inflicted those injuries with a knife (P2). Blood stains were found on P2 though insufficient for blood grouping. The opinion of PW15 lend weight to the evidence of PW7, PW9 and PW10 as opposed to the evidence of the appellant when PW15 said that the injuries were caused by a sharp object and *considerable force was used* to inflict those injuries. Therefore, this defence was, in our view, rightly rejected by the learned judge.

The defence of grave and sudden provocation falls within exception 1 to s 300 of the Penal Code. It reads:

> Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of another person by mistake or accident.

The learned judge, in our view, correctly approached the defence of grave and sudden provocation in his judgment. It is in line with what had been stated by our Supreme Court in *Lorensus Tukan v PP* [1988] 1 MLJ 251 at p 253. This is what the learned judge said at p 23 (p 124 of the appeal record) of his judgment:

> It is an established principle of law that the test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the accussed, placed in the situation in which the accused was placed, would be provoked as to lose his self-control. No abstract standard of reasonableness can be laid down. What a reasonable man would do under the circumstances depends upon the customs, manners, way of life, traditional values, etc — in short, the cultural, social and emotional background of the society in which the accused belongs. It is for the court to decide in each case having regard to all the relevant circumstances. In order to succeed, the provocation must: (a) be grave and sudden; and (b) have by its gravity and suddenness deprived the accused of the power of self-control.

A The learned judge had, in our view, adequately considered the evidence relied on by the appellant on the defence of grave and sudden provocation. He gave his reasons why he rejected this defence. We need not repeat them here. There were no grounds for us to disagree with him. In fact, he found that from his demeanour in court, the appellant gave an outward impression of being a calm and collective person (see p 126 of the appeal record). He B further found that from the series of events, the provocation which the appellant alleged to have suffered, was a gradual one.

The learned judge, after having considered with great care and circumspection the defences raised by the defence, was satisfied that the defence has not raised any reasonable doubt in his mind as to the truth of C the prosecution's case or as to the guilt of the appellant. On the facts and the law, he was satisfied that the prosecution had proved beyond reasonable doubt all the essential ingredients of the charge under s 302 of the Penal Code against the appellant. He accordingly convicted the appellant on the said charge and sentenced him to death.

D As is in this case, where the decision of the trial judge is based on credibility of witnesses, the appellant court must be convinced that the decision was plainly wrong and was against the weight of the evidence. We can do no better than to quote a passage from *Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 where at p 275, our Federal Court said:

> E ... The credibility of a witness is primarily a matter for the trial judge. There is a homogeneous concatenation of authorities on this principle and we refer to the locus classicus on this aspect in a passage in the judgment of Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484 at p 487. The Privy Council said in *Caldeira v Gray* [1936] MLJ 137 at p 138 that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character F and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but must be convinced that it is wrong.

Having scrutinized the judgment and after considering the submissions of G counsel for the appellant and the deputy public prosecutor for the prosecution, there was no doubts in our mind that the decision of the learned judge was right. We were not convinced that he was wrong.

In the circumstances, the appeal was dismissed and we accordingly affirmed the conviction and the sentence.

H *Appeal dismissed.*

Reported by Andrew Christopher Simon

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